FILE COPY

IN THE

Supreme Court of the United States

No. 307. OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

SANTOS FLORES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

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In the Supreme Court of the United States.

OCTOBER TERM, 1932. No. 567.

The United States of America, Appellant,

v.

Santos Flores.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

STATEMENT.

The facts set out in the stipulation of counsel (R. 4) have, by that stipulation, the same force and effect as a bill of particulars filed by the Government and therefore must be considered as part of the indictment demurred to.

The indictment, so amplified, charges appellee, an American citizen, with murder of another

American citizen on board an American vessel when that vessel was attached to the shore by cables and was unloading cargo by means of a cable and sling at the Port of Matadi, a port under and subject to the sovereignty of the Kingdom of Belgium and located on the Congo River 250 miles inland from the river's mouth. It is charged in the indictment that on this factual situation the vessel was within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States. The Government contends the offense so charged was an offense against the peace and dignity of the United States and justiciable under Section 272 of the *Criminal Code.*

The District Court sustained a demurrer to the indictment and the accused was discharged without day (R. 1), the court holding that the case was controlled by *United States ex rel Maro* v. *Mathues,* 21 Fed. (2nd) 533, affirmed in *Mathues* v. *United States ex rel Maro,* 27 Fed. (2nd) 518 (C. C. A. 3rd). The indictment in the Maro case charged that the crime was committed—

> "upon the high seas out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the United States, and within the

> jurisdiction of this court, in and on board of a certain vessel of the United States * * * then being at anchor in the harbor or port of Livorno or Leghorn, Italy." (The indictment is quoted in full in the appendix to this brief.)

The language of this indictment is as broad as the phraseology of the Criminal Code. In the Government's brief filed in that case in the Circuit Court the question involved is stated as follows:

> "Did the United States District Court for the Eastern District of Pennsylvania have jurisdiction to try a person charged with violation of criminal statutes of the United States when the alleged violations occurred on board a vessel owned and operated by the United States Shipping Board, which vessel was, at the time of the occurrence, anchored in the Port of Livorno (Leghorn), Italy, being at the same time attached to a wharf by cables extending from the wharf to the ship (there not being sufficient water depth to permit ship to be moored alongside said wharf)?"

In that case, as here, the Government argued that the crime was one within the admiralty and maritime jurisdiction within the meaning of the Constitution and Section 272 of the *Criminal Code*. There was no inconsistency of statement

in the indictment in the Maro case and the question now before the court was there clearly raised.

The present appeal is taken by the Government from the order sustaining the demurrer. The Government does not contend that there is any valid distinction between the Maro case and the case at bar and in its brief admits that if the power of Congress to enact the law rests upon Article I, Section 8, Clause 10 of the Constitution "to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations," the decision of the lower court was correct. The contention is that under Section 2 of Article III of the Constitution extending the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," Congress has power to define and punish all crimes committed in any location if that location is a place within the admiralty and maritime jurisdiction of the United States and that an offense committed on an American vessel attached to the shore at a foreign port on a foreign river under the exclusive jurisdiction of a foreign sovereign many miles inland, is within the admiralty and maritime jurisdiction of the United States within the meaning of the *Constitution* and the *Criminal Code.*

It is the contention of the appellee that in its criminal jurisprudence relating to crimes against

private individuals, the United States has always adhered to the territorial principle of jurisdiction and has consistently refused to recognize the doctrine of extra-territoriality of merchant vessels in a foreign port.

That Congress in using the phrase "admiralty and maritime jurisdiction" in the *Criminal Code*, did not intend to depart from this territorial principle of jurisdiction as a history of the various previous statutes on the subject and their interpretation by the court demonstrates.

The power to punish crimes committed on waters is specifically granted by Article I, Section 8, Clause 10 of the Constitution and the phrase "admiralty and maritime jurisdiction" must be construed with reference to this provision to preserve its constitutionality; so construed the District Court had no jurisdiction over the offense.

ARGUMENT.

I.

THE CRIMINAL JURISDICTION OF THE UNITED STATES IS BASED UPON THE TERRITORIAL PRINCIPLE. In *United States* v. *Bowman*, 260 U. S. 94, 98, the late Chief Justice Taft said:

> "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery * * * must, of course, be

committed within the territorial jurisdiction of the Government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute and failure to do so will negative the purpose of Congress in this regard."

James Bassett Moore, *Digest of International Law,* Volume 2, page 263, after discussing the theory of criminal jurisdiction, says:

"In the United States the territorial principle is the basis of criminal jurisdiction and the place of the commission of an offense is generally recognized as the proper and only place for its punishment."

"As a general rule the jurisdiction of a State is exclusive and absolute within its own territories of which harbors and territorial waters are as clearly a part as the land"—*Laurence—Principles of International Law,* p. 208.

It is suggested by the Government that the present case may be brought within this principle of territorial jurisdiction, on the fiction that a vessel is part of the territory of the nation whose flag she flies. This is a fiction of limited application.

In *Cunard Steamship Company* v. *Mellon,* 262 U. S. 100, 124, the court said:

"The defendants further contend that the amendment (Eighteenth) covers foreign merchant ships when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries, the contention would fail, but as that is a fiction we think the contention is right.

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence just as with other objects within those limits."

The court describes the fiction as a "metaphor" citing *Scharrenburg* v. *Dollar Steamship Co.*, 245 U. S. 122, 127; *Re Ross*, 140 U. S. 453, 464; *1 Moore, International Law Digest*, Sec. 174; *Westlake, Internatinal Law*, 2nd Edition, page 264; *Hall, International Law*, 7th Edition, Sec. 76; *Manning, Law of Nations*, page 276; *Piggott, Nationality*, Pt. 2, page 13;*

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* See also *Wharton—International Law*, 2nd Ed. Vol. 1, §35a. Mr. Marcy, Secretary of State, to Mr. Clay, letter August 31, 1855, said: "This government does not apply the doctrine of extraterritoriality to its private or merchant ships in foreign ports, except in cases where it has been conceded by treaty or established by usage"; Moore, Vol. 1, §174 International Law refers to the jurisdiction of national ships on high seas as "quasi-territorial"; *Woolsey—Int. Law*, §54; *Field—International Code*, §309.

The cases cited by the government for an extended jurisdiction can be distinguished: In *King* v. *Bruce*, 2 Leach 353; *Queen* v. *Carr*, L. R. 10 Q. B. D. 76, and *Queen* v. *Anderson*, L. R. 1 Crown Cases Reserved 161, the locality of the offense was below the first bridge and within the ebb and flow of the tide. This falls literally within the Statutes of Richard. *Croxell* v. *Benson*, 285 U. S. 421 and *Panama R. R.* v. *Johnson*, 264 U. S. 375, relate to adjective law of procedure in admiralty rather than a substantive extension of the localities included in the jurisdiction.

> "The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty (cases cited). It is chiefly applicable to ships on the high seas where there is no territorial sovereign; and as respects ships in foreign territorial waters, it has little application beyond what is affirmatively or tacitly permitted by the local sovereign."

Phillip C. Jessup in his treatise, *Law of Territorial Waters and Maritime Jurisdiction,* page 119, in speaking of the extra-territoriality of merchant ships, says:

> "In the first place it may be definitely asserted that the fiction of territoriality of merchant vessels is not established in international law. In other words, all nations seem to agree that the basic principle holds true that a nation is sovereign throughout the extent of its territory and that ports and harbors are included within that territory. Even the French, and especially the Italian, jurisprudence which contain the widest application of the theory of the immunity of a vessel, seem to agree upon this point. In the second place, there is also general agreement that the local sovereign may act freely when the peace or tranquillity of the port is compromised, when strangers to the vessel

> are involved, or when the local authorities are appealed to. In the third place it must be confessed that there is not unanimity in regard to the exercise of local jurisdiction in matters solely affecting the internal order of the vessel. The United States and Great Britain assert the complete legal power of the local state and catalog exceptions under the heading of 'discretion.' This view seems to be followed by Chile and Ecuador and, through the medium of reciprocity, by Mexico and Brazil. The Netherlands also tend in this direction. As for those countries which adhere to the so-called French rule, such as France, Italy and Belgium, it has been noted that there is a tendency to accept the moral disturbance theory which is the same as that enunciated by the Supreme Court of the United States in the Wildenhus case."

In the *Wildenhus case,* 120 U. S. page 1, the defendant, a subject of Belgium, committed a murder on a Belgian steamship. He was a member of the crew as was also the deceased. The ship at the time was moored to a dock at the port of Jersey City and the killing occurred entirely below decks and in no way disturbed the peace and tranquillity of the port as a matter of fact. The Belgian Consul petitioned for the release of Wildenhus that he might be tried according to the law of Belgium. Under a treaty existing between the United States and Belgium

(21 Stat. 776) consuls were given exclusive charge of all matters concerning the internal order of the merchant vessels of their nation and the local authorities agreed not to interfere except when the nature of the offense was such as to disturb the tranquillity of the port. Chief Justice Waite, delivering the opinion of the court, said:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel and among themselves. And so, by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her and did not involve the peace or dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require."

The court next considers whether the offense was of a nature to disturb the public peace of the people who looked to the State of New Jersey for protection:

> "If the thing done * * * is of a character to affect those on shore, or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment * * *. It is not alone the publicity of the act or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself."

The court then quotes with approval *Ortolan (Diplomatie De la mer,* 4th Ed. 455, 456):

> "Considering that every state is interested in the repression of crimes and offenses that may be committed in the ports of its territory, not only by the men of the ship's company, of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port or the intervention of the local authority is involved, or the act constitutes a crime by common law, the gravity of which does not permit any nation to leave it unpunished without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory."

It is thus apparent that the criminal jurisdiction with reference to such crimes as murder and manslaughter is essentially territorial. The doc-

trine of the territoriality of a merchant vessel applies strictly only when the ship is on the high seas and therefore under no other jurisdiction. When in a foreign port, the jurisdiction of the nation whose flag she flies extends only to matters affecting the internal order of the ship. When the offense is a grave crime, the United States considers that the act *in law* compromises the tranquillity of the port and takes jurisdiction, even if *in fact* the crime was accompanied by no publicity or disturbance—and even in the face of protest by the nation of the flag (*Wildenhus case*). It would be inconsistent for the government to claim a larger jurisdiction over the ships of its nationals in foreign ports than it is itself willing to concede over foreign ships in its own ports.

II.

THE PRIOR LEGISLATION NOW EMBODIED IN SEC. 272 OF THE CRIMINAL CODE AND THE INTERPRETATION OF THESE STATUTES BY THE COURT SHOWS THAT CONGRESS DID NOT INTEND TO DEPART FROM THE TERRITORIAL PRINCIPLE OF CRIMINAL JURISDICTION AND PUNISH THE CRIME OF MURDER COMMITTED WITHIN THE TERRITORIAL JURISDICTION OF ANOTHER SOVEREIGN.

The Criminal Code, Act of March 4, 1909, C. 321, Section 272, 35 Stat. 1088, 1142 (U. S. C. Title 18, Section 451) provides:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First, when committed upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any state, territory or district thereof. * * *"

The phrase "admiralty and maritime jurisdiction" is taken from Article III, Section 2 of the Constitution and its scope and meaning must be determined by reference to the accepted conception of the jurisdiction of admiralty in England and the Colonies at the time the Constitution was adopted.

The admiralty jurisdiction of England originally extended to all crimes and offenses committed upon the sea and in all ports, rivers and arms of the sea as far as the tide ebbs and flows. *The Statute, 13 Richard II,* Chapter 5 modified this ancient jurisdiction by the following language:

> "That the admirals and their deputies, shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward, grandfather of our Lord the King that now is."

Statute, 15 Richard II, Chapter 3 saved to the admiralty, jurisdiction of deaths and mayhem occurring on "great ships being hovering on the main streams of great rivers only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers." The effect of these statutes was much disputed by the proponents of the admiralty and the common law lawyers. The *Statute of 28 Henry VIII,* Chapter 15 gave the admiralty cognizance of "all treasons, felonies, robberies, murders committed in or upon the sea, or in any other haven, river, creek or place where the admiral or admirals have or pretend to have jurisdiction." Lord Hale in his exposition of the Statute, says:

> "This seems to me to extend to great rivers where the sea flows and reflows below the first bridges * * * but we are not to explain the words (pretend to have) to such a pretense as is without any right at all; and therefore, although the admiral pretend to have jurisdiction upon the shore when the tide is reflowed, yet he hath no cognizance

of a felony committed there." (2 Hale's P. C. 16, 17.)

In England after 1363 the "admiral's criminal jurisdiction was recognized as exclusive on the high seas. This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship, whether subject or not, and over any one in cases of piracy at common law. It could be exercised over no other person." *(Holdsworth Vol. 1, p. 550—Hist. of Eng. Law.)*

The colonial courts of Vice-Admiralty exercised a somewhat more extensive jurisdiction but it was long established that the jurisdiction extended only to the high seas and to waters where the tide ebbs and flows. (See Story's elaborate opinion in *DeLovio* v. *Boit,* 7 Fed. Cas. 418; *U. S.* v. *Coombs,* 12 Peters 70; *U. S.* v. *James M'Gill,* 4 Dallas 424.)

The present Criminal Code was preceded by and is in the nature of a re-enactment of several criminal statutes on the subject. A careful study of the provisions of these former enactments and the cases decided under their terms shows that Congress has not attempted to extend its criminal jurisdiction to crimes committed within a foreign territorial port and this court, in construing these statutes, has never sustained a conviction for such a crime as being within the admiralty jurisdiction.

The *First Crimes Act, April 30, 1790,* Chapter 9, Section 8, 1 Stat. 112, 113, provided for the punishment of murder committed upon:

> "the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state. * * *"

The language of this act follows substantially the phraseology of the *Statute of 28 Henry VIII,* Chapter 15 and of the commissions issued to the vice admirals of the Colonies, and in accordance with the conception of the jurisdiction which has been accepted, the terms "river, haven, basin or bay" must logically be limited to places which feel the ebb and flow of the tide.

In *United States* v. *James M'Gill,* 4 Dallas 424, 427, the defendant had given a mortal stroke to one in the haven of Cape Francois but the deceased did not die until his removal on shore. The indictment was under Section 8. Mr. Justice Washington, after deciding that the death as well as the mortal stroke must happen on the high seas, said:

> "But the more important question is, whether the present case remains unprovided for by the laws of the United States. * * *
>
> "we have been properly referred to the Constitutional provision that 'the judicial powers shall extend to all cases of admiralty

> and maritime jurisdiction,' but still the question recurs, is this a case of admiralty and maritime jurisdiction within the meaning of the Constitution? The words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice we derive our system of jurisprudence, and, generally speaking, obtain the best glossary). But no case, no authority has been produced to show that in England such a prosecution would be sustained * * * as a cause of admiralty and maritime jurisdiction. * * * Upon the whole, therefore, I am of opinion that the present is a case omitted in the law; and that the indictment cannot be sustained."

Here we have an offense which admittedly and literally took place in a "haven," but the court in effect held that in addition to this, the offense to be indictable under the Act must further have been one of which admiralty would take cognizance.

In *United States* v. *Bevans,* 3 Wheat. 336, 388, which involved a murder on a United States warship in Boston Harbor, it was contended by the Government that since the granting of admiralty jurisdiction to the federal courts was exclusive, there was no such jurisdiction remaining in the states, and therefore the condition

that the offense must be committed "out of the jurisdiction of any particular state," was met. Chief Justice Marshall very clearly illustrates the distinction between admiralty jurisdiction and territorial, criminal or general jurisdiction:

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?
>
> * * * * * * *
>
> "It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory * * *. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power the framers of our Constitution had not in view any cession of territory; or what is essentially the same, of general jurisdiction."

In *United States* v. *Wiltberger*, 5 Wheat. 76, the indictment was under Section 12 of the Act of 1790 which punished manslaughter committed on the high seas. The manslaughter in this case was committed on an American vessel when the vessel was 100 yards from the shore on a Chinese river (35 miles above its mouth). The court in an opinion by Chief Justice Marshall construed the statute strictly, holding that the words

"high seas" could never extend to a river in the interior of a country.

After the decision in the *Wiltberger case,* the *Crimes Act,* was redrafted by Mr. Justice Story, becoming the *Act of March 3, 1825,* Chapter 65, 4 Stat. 115 (1 Story, Life of Story, 297, 437, 439, 440; 2 Story, Life of Story, 402). Section 4 of this Act provides for punishment of murder committed:

> "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state * * *."

The Act further provides for the punishment of offenses committed on an American ship by any passenger or person belonging to the company of the said ship, on any other person of like description while the ship is lying in a foreign port. But it is provided:

> "that if such offender shall be tried for such offense, and acquitted or convicted thereof in any competent court of such foreign state or sovereign, he shall not be subject to any trial in any other court of the United States."

The fact that the courts held that the description of the places mentioned in the Act of 1790 must further meet the description "within the ad-

miralty and maritime jurisdiction of the United States," accounts for the inclusion of this phrase in the Act of 1825, and it is submitted that its inclusion made no change in the law. It is further important to observe that the jurisdiction over crimes committed on an American vessel in a foreign port was strictly limited to offenses by one member of the personnel of the ship against another, and the proviso clearly indicates that Congress did not intend to subject such offenders to a double trial and recognized the jurisdiction of the territorial sovereign.

In *United States* v. *Coombs,* 12 Peters 70, 75, 78, the defendant was indicted under Section 9 of the Act of 1825 for stealing merchandise belonging to a ship in distress and cast away on a shoal of the sea on the coast of New York. The case is primarily of interest in this discussion as showing what interpretation Mr. Justice Story, the author of the Act, placed upon the phrase "in any place within the admiralty and maritime jurisdiction of the United States":

> "Before we proceed to the direct consideration of the true import and interpretation of this section, it seems highly important, if not indispensable, to say a few words as to the constitutional authority of Congress to pass the same. For if, upon a just interpre-

> tation of the terms thereof, Congress have exceeded their constitutional authority, it will become our duty to say so. * * * On the other hand, if the section admits of two interpretations, each of which is within the constitutional authority of Congress, that ought to be adopted which best conforms to the terms and the objects manifested in the enactment and the mischiefs which it was intended to remedy. And again, if the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any constitutional authority. * * *"

Referring to the clause of the Constitution giving to the federal courts jurisdiction in admiralty and maritime cases, Mr. Justice Story says:

> "* * * the question which arises is, what is the true nature and extent of admiralty jurisdiction? Does it, in cases where it is dependent upon locality, reach beyond high water mark? Our opinion is that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide-waters, as far as the tide flows, and that it does not reach beyond high water mark. It

> is the doctrine which has been repeatedly asserted by this court and we see no reason to depart from it."

The learned justice then refers to several cases where the jurisdiction of the admiralty is not limited by the locality of the acts done, and concludes:

> "In our judgment, the authority of Congress under this clause of the Constitution does not extend to punish offenses committed above and beyond high water mark."

The next revision of the criminal law on the subject appears in the *Revised Statutes,* Sections 5339 and 5346. These statutes describe the locus of the crime necessary to give jurisdiction as "upon the high seas or in any arm of the sea or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." Section 5346 punishes certain offenses within the above described locus when committed on board an American vessel. It is important to note that in this revision there is no specific reference to offenses committed on an American vessel while in a "foreign port." Likewise, the proviso in the Act of 1825 aimed at preventing an offender being tried twice—once

by the territorial sovereign and again by the United States—is dropped.

In *Wynne* v. *United States,* 217 U. S. 234, 241, 244, the indictment was under Section 5339 of the Revised Statutes. The case turned entirely on the meaning of the word "state" in the phrase, "out of the jurisdiction of any particular state." Mr. Justice Lurton, delivering the opinion of the court, stated the question thus:

> "Shortly stated, the contention is that the haven or arm of the Pacific Ocean which constitutes the Harbor of Honolulu, although 'within the admiralty and maritime jurisdiction of the United States,' is a locality not 'out of the jurisdiction of any particular state' because within the jurisdiction of Hawaii."

The court on ample authority held that the word "state" referred to a state of the United States, and further, that there was nothing in the legislation applicable to the territory of the Hawaiian Islands which prevented the operation of Section 5339. The territory of Hawaii is not a foreign sovereign:

> "It was within the power of Congress to confer upon its courts exclusive jurisdiction over all offenses committed within the territory, whether on land or water."

United States v. *Rodgers,* 150 U. S. 249, 258, 266, was an indictment under Section 5346, involving an offense committed on an American vessel upon the Canadian side of the Detroit River. The case turns on the scope of the expression "high seas." In an opinion by Mr. Justice Field, the court held that the Great Lakes—

> "* * * possess all of the general characteristics of open seas, except in the freshness of their waters and in the absence of the ebb and flow of the tide * * * They are inland seas and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tidewaters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.
>
> * * * * * * *
>
> "It is true that lakes properly so-called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a state, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision and which are navigable at all times in all directions, and border on different nations or states or people, * * * are seas in fact, however they may be designated."

The decision of the court then proceeds on the theory that the Detroit River is an arm of the sea and an offense occurring on an American vessel on the Canadian side of the river falls within the statute. The Detroit River connects the waters of Lake Huron with the waters of Lake Erie and constitutes the boundary between Canada and the United States and is in the nature of a strait connecting two seas, rather than a "river" properly so-called. It is submitted that the situation here presented is entirely distinct from the case of port on a river entirely within the body of a foreign sovereign and thus forming part of the territorial sovereignty, and this observation has particular force when the vessel is attached to the shore as was the case in the present appeal. Mr. Justice Gray in an elaborate opinion, dissented on the ground that the Great Lakes were not "high seas" within the meaning of the *Crimes Act*. Mr. Justice Brown filed a similar dissenting opinion.

The final form of the criminal statute is Section 272 of the *Criminal Code* quoted above. It is to be observed that in this enactment the phrase "in any river, haven, creek, basin or bay" has been omitted, and instead the phrase "on any other waters within the admiralty and maritime jurisdiction" is used. The phraseology thus used copies the phraseology of the Constitution.

United States ex rel Maro v. *Mathues,* 21 Fed. (2nd) 533, 534 held that this section did not apply where the offense charged was committed on an American vessel moored to a wharf in a foreign port. The court said:

> "The offense here, if any, was committed in an Italian port. The quoted expression of Congress (within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state) evidently has application to domestic and not foreign waters and to waters which are outside of the jurisdiction of any nation and are commonly denominated the high seas."
>
> * * * * * * *
>
> "Congress (at least expressly) is not given authority 'to define and punish felonies' but is given such power only when the felonies are committed on the high seas. The point sought to be made clear is that the question is not one of admiralty and maritime jurisdiction but is one of criminal jurisdiction."
>
> * * * * * * *
>
> "This brings us to the proposition that Congress has not undertaken to define and punish felonies other than those committed on the high seas or upon waters within the territorial jurisdiction of the United States,

> which are not within the jurisdiction of any particular state * * *."

In affirming the decision of the District Court in this case (*Mathues* v. *U. S. ex rel Maro,* 27 Fed. (2nd) 518), the Circuit Court of Appeals for the Third Circuit in an opinion by Judge Buffington construed Section 272 of the *Penal Code* as resting upon the constitutional provision enabling Congress to define and punish felonies committed on the high seas.

It is submitted, after a careful study of the phraseology of these various criminal statutes and the cases decided under them, that the continuing intention of Congress has been to limit the criminal jurisdiction of the Federal courts to offenses committed on the high seas or waters having characteristics of the high seas for practical commercial purposes, and the court in construing the phrase "admiralty and maritime jurisdiction" in these statutes has applied it only to the high seas or waters which are *res nullius* and essentially public in character where the ships of all nations may go as a matter of natural right.

At this point, in order to prevent any confusion, it should be emphasized that we are here dealing with the criminal jurisdiction of the dis-

trict courts which is entirely distinct from the admiralty courts' jurisdiction over contracts and torts and other special cases. Thus in *Waring* v. *Clarke,* 5 Howard, 441, 454, 464, the court held that a libel *in rem* to recover damages for a collision on the Mississippi River was justiciable in admiralty even though the place of the collision was *infra corpus comitatis,* and in *Genessee Chief* v. *Fitzhugh,* 12 Howard, 443, 454, the court held that admiralty had jurisdiction over a collision occurring on the Great Lakes on the ground that they were in fact "inland seas" and that the same reasons which induced admiralty to take jurisdiction of collisions on the high seas applied with equal force to the Great Lakes:

> "If it is a public navigable water on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same."

Since this decision, it has generally been conceded that "navigability" is the test of civil jurisdiction in matters of tort.

If, however, we assume that all navigable waters were comprehended by the phrase "admiralty and maritime jurisdiction," in the Criminal Code the jurisdiction would be absurdly extended. Such a construction would cover a crime committed on a foreign ship by a foreigner against another foreigner in any navigable river

on the globe (excepting only waters within the jurisdiction of a state of the United States). Furthermore, if this were so, the third clause of the section referring to crimes committed on an American vessel would have no meaning since the case would be covered by the second clause.

Obviously, the general words of the statute must be limited to the jurisdiction of the sovereign and the intended objects of the legislation:

> "The words of the section," said Chief Justice Marshall, referring to Section 8 of the Act of 1790, "are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state but also to those objects to which the legislature intended to apply them. * * * It would seem offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by the law to punish." (*U. S.* v. *Palmer,* 3 Wheat, 610.)

Now, if in the Statute of 1825 the general provision was to operate within a foreign jurisdiction, there would be no need for the limited jurisdiction over certain offenses committed on American ships covered by Section 5, which section by its very terms applies to foreign ports. The conclusion therefore seems irresistible that the gen-

eral provision did not contemplate a foreign port and since the general phraseology is carried into the present act, its construction must be the same as it was in prior acts.

The provision respecting crimes on American vessels in the *Revised Statute* and in the *Criminal Code* is likewise generalized and not limited to the personnel of the ship or its internal regulation. In passing the Acts Congress must have been aware that under previous legislation the only crimes in a foreign port made punishable were those under Section 5 of the *Act of 1825*. Can it be said that by dropping the express language extending the jurisdiction to a foreign port, Congress intended to assert greater jurisdiction in such a port? Failure to state expressly an extraterritorial operation of a criminal statute negatives the purpose of Congress in this regard (*U. S.* v. *Bowman*, 260 U. S. 94, 98),* since the offense is not one of that peculiar character such as treason, which would be equally calculated to injure the Federal Government or its citizens wherever committed.

* The English courts likewise refuse to extend general criminal jurisdiction beyond the territory of the sovereign without express statutory authority. In *R.* v. *Keyn L. R.*, 2 Ex. Div. 63, the judges admitted that any nation by international law could exercise jurisdiction over waters washing the coast to the three-mile limit but refused to take jurisdiction of a crime committed within these territorial waters by a foreigner on the ground that such jurisdiction had never been exercised by any English king. This necessitated the passage of the *Territorial Waters Jurisdiction Act* of 1878 *specifically* assuming this jurisdiction.

Every principle which takes out of the operation of the Acts of Congress crimes committed by Americans on foreign vessels on the high seas, applies with greater force to offenses committed within the acknowledged and fixed territorial limits of a foreign state because it is dependent entirely on the national character of the place of the offense, and cannot, by any sound reasoning, reach that which is territorial by implication only, and yet be excluded from that which is actual territory.

It is submitted that at most Congress, by the broad phraseology of the *Criminal Code* covering offenses committed on American ships, intended no enlargement of the jurisdiction given by Section 5 of the Act of March 3, 1825, c. 65 in foreign ports. Such jurisdiction would not cover the case at bar because it is not alleged in the indictment that the defendant and the deceased were members of the crew or passengers. Only such a construction would bring the statute into conformity with international law and the territorial principle of criminal jurisdiction as applied by the Federal Courts.

Criminal statutes must be construed strictly and the phrase "admiralty and maritime jurisdiction of the United States" must be construed as including those places where that jurisdiction is *complete*—where, as a matter of absolute right,

the executive officers of the government can enforce the laws and make arrests—where no other sovereign has jurisdiction. This applies externally only to the "high seas" or waters which are in their nature high seas over which no one nation can exercise exclusive dominion.

This construction is in conformity with the opinion of Attorney General Cushing, *7 Op. of Atty.-Gen., 721,* July 21, 1856:

> "The criminal jurisdiction of our courts does not extend to acts of violence committed on board a ship within the jurisdiction of a foreign state, but only to such acts committed on the high seas, or in any river, haven, lake, or bay out of the jurisdiction of any particular state (See *Act of April 30, 1790,* 1 Stat. at Large, p. 113; also the *Schooner Exchange* v. *McFadden,* 7 Cranch, 116, 144; *U. S.* v. *Wiltberger,* 5 Wheaton, 76; *Ortolan, Diplomatie de la Mer II,* Chap. 13)."

III.

THE GRANT OF LEGISLATIVE POWER TO CONGRESS TO DEFINE AND PUNISH FELONIES COMMITTED ON WATERS RESTS ON ARTICLE I, SECTION 8, CLAUSE 10 OF THE CONSTITUTION AND THE CRIMINAL CODE MUST BE CONSTRUED WITH REFERENCE TO THE CONSTITUTIONAL GRANT.

A further consideration, which we submit should induce the court to accept a narrow construction of the phrase "admiralty and maritime

jurisdiction" as used in the Criminal Code, is the question of the constitutionality of the statute. It is well settled that there are no crimes at common law cognizable by the Federal courts. The only express power given to Congress to define and punish felonies committed on waters is the power given under Article I, Section 8, Clause 10 of the Constitution, and this is limited to piracies and felonies committed on the high seas and offenses against the law of nations. Congress is given no grant of legislative power over the substantive maritime law. The grant of jurisdiction of admiralty and maritime cases occurs in an entirely separate article and it is submitted that the concluding paragraph of Article I, giving Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or any department or officer thereof," has no direct application to Section 2 of Article III, since this section merely transferred the existing admiralty jurisdiction residing in the states under the Article of Confederation to the Federal government. Mr. Justice Story, in *United States* v. *Coombs,* 12 Peters 72, 78, stated:

> "In our judgment the authority of Congress under this clause of the Constitution does not

extend to punish offenses committed above and beyond high water mark."

This was the view taken by Mr. Justice Washington (*U. S.* v. *M'Gill,* supra), by Judge Dickinson (*Maro case,* supra), and by Judge Buffington on appeal (*Maro case,* supra).

Where a power is given in express terms as in the power to define and punish felonies committed on the high seas, Congress cannot ignore the express power and infer the same power without limitation from some other provision in which the power is not expressed. (See *People* v. *Tyler,* 7 Mich. 162, for a very full discussion of this question.)*

A consideration of the constitutional basis of the statute leads to the narrower construction here contended for and the application of the rule laid down by Mr. Justice Story (*U. S.* v. *Coombs,* supra):

* In this case the Supreme Court of Michigan held similar views. All the judges of the court filed opinions. Martin, *Ch. J.*, and Campbell, *J.*, held the *Crimes Act of March 3, 1857* (which contains the same general phraseology "within the admiralty jurisdiction etc."), was not intended to apply to rivers within the exclusive jurisdiction of a foreign sovereign. Christiancy, *J.*, reached the same conclusion limiting the scope of the Act to the grant of power contained in Article 1, Section 8, Clause 10, of the Constitution. Manning, *J.*, thought the Act extending admiralty jurisdiction over the Great Lakes unconstitutional. This case involved a crime on the St. Clair River which connects Lake Huron and Lake Erie and is in fact in the nature of a strait connecting two "inland seas." The river is therefore probably within the jurisdiction of the statute and the actual decision cannot be reconciled with *U. S.* v. *Rodgers,* supra. The reasoning, however, applies with force to the present appeal where the locality was a foreign port entirely within the jurisdiction of a foreign territorial sovereign.

"if the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction."

IV.

CONCLUSION.

The general language "admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state" used to describe location in the Criminal Code, is limited by the territorial principle of criminal jurisdiction and the constitutional grant of power to Congress to define and punish felonies on the high seas. Congress did not intend the act to apply to such a crime as murder committed in a foreign port in the interior of a country many miles from the sea.

The judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN V. LOVITT,
Attorney for Appellee.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
Of Counsel.

APPENDIX.

INDICTMENT.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

United States of America,
v.
Joseph Maro, alias Giuseppe Marro
No. 1758
June Sessions, 1926.

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, do present, that heretofore, on or about August 8, 1924, upon the high seas, out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this Court, in and on board of a certain vessel of the United States, to wit: the American Steamship "City of St. Joseph", then being at anchor in the harbor or port of Livorno or Leghorn, Italy, one JOSEPH MARO, alias GIUSEPPE MARRO, with force and arms, by

striking him on and about the head with a bottle, in and upon the body of one Joseph C. Koontz, then and there being, feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did kill and murder the said Joseph C. Koontz:

Contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, as aforesaid, do further present, that heretofore, to wit: on August 8, 1924, the said Joseph Maro, alias Giuseppe Marro, upon the high seas, out of the jurisdiction of any particular State of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this Court, in and on board of a certain vessel of the United States, to wit: the American Steamship "City of St. Joseph," then being at anchor in the harbor or port of Livorno or Leghorn, Italy, with force and arms, by striking him on and about the head with a bottle, in and upon the body of one Joseph C. Koontz, then and there being, feloniously, wilfully, deliberately, with premeditation, and of his malice afore-

thought, did make an assault, and then and there feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did give to the said Joseph C. Koontz, a mortal wound, of which said mortal wound, the said Joseph C. Koontz, from the 8th day of August, 1924, until the 5th day of October, 1924, upon the high seas, out of the jurisdiction of any particular State of the United States, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this Court, did languish, and languishing, did live, on which same 5th day of October, 1924, the said Joseph C. Koontz, within the jurisdiction of this Court, of the said mortal wound, did die.

And so the Grand Inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say that the said Joseph Maro, alias Giuseppe Marro, him the said Joseph C. Koontz, in manner and form aforesaid, feloniously, wilfully, deliberately, with premeditation, and of his malice aforethought, did kill and murder:

Contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

(Sgd.) GEORGE W. COLES,
United States Attorney.

Philadelphia, Pa.
13 September, 1926.